IN THE

Supreme Court of the United States

October Term, 1964

CASE No. 72

CITY OF PLANTATION, a municipal corporation of Broward County, Florida,

Appellant,

vs.

UTILITIES OPERATING CO., INC., a Florida corporation,

Appellee.

BRIEF IN OPPOSITION TO MOTION TO DISMISS

INTRODUCTION

The appellee has moved to dismiss the appeal upon the ground that no federal question is presented thereby. This brief is presented in opposition to appellee's contention.

REPLY TO APPELLEE'S STATEMENT OF CASE

The appellee's brief (page 7) points to Article XVI, Section 20 of the Florida Constitution, as the provision of state organic law which permitted that sovereign to

usurp the city's rate-making authority. However, by its own terms, that section provided for state correction of abuses and prevention of unjust discrimination and excessive charges *by a public utility company*. The Statute here challenged was not enacted at the behest of consumers who were being victimized by the public utility. Indeed, the transfer of rate-making authority to the public utilities commission has resulted only in steadily increasing rates. *Utilities Operating Co. v. King*, Fla. 1962, 143 So.2d 854; *Plantation v. Mason*, Fla.1964, —— So.2d——; *Village of North Palm Beach v. Mason*, Fla. 1964, ——So.2d——.

In summarizing appellant's argument, the appellee's brief (page 8) overlooks appellant's claim (Jurisdictional Statement, page 9) that, assuming the State's right to impair franchise agreements, the challenged Statute was an improper exercise of that power insofar as it arbitrarily and discriminatorily excluded cities of more than 100,000 from similar intervention.

REPLY TO APPELLEE'S ARGUMENT

The appellee urges that the "King can do no wrong", and therefore the State of Florida had absolute authority to do whatever it chose to the appellant/city, including of course, impairing the city's franchise agreement. In reaching this conclusion, the appellee relies upon some sweeping dicta from *Pawhuska v. Pawhuska Oil & Gas Co.*,[1] *Trenton v. State of New Jersey*,[2] and similar cases.

This Court had occasion to reconsider such "seem-

[1]Cited at page 10, appellee's brief.
[2]Id., page 9.

ingly unconfined" dicta in *Gomillion v. Lightfoot*, 364 U.S. 339, 81 S.Ct. 125, 5 L.Ed.2d 110 (1960), and held that the State *does not have uncontrolled power* "to manipulate in every conceivable way, for every conceivable purpose, the affairs of its municipal corporations", and that

> " * * * the Court has never acknowledged that the States have power to do as they will with municipal corporations regardless of consequences. Legislative control of municipalities, no less than other state power, lies within the scope of relevant limitations imposed by the United States Constitution. * * * "

Indeed, even the Supreme Court of Florida did not rely upon a "plenary power" theory in the decision here challenged, but, rather, held that the State had the police power to usurp the appellant's rate-making authority (Jurisdictional Statement, App. 5-6). The only federal decision appearing in that Court's opinion is *Pudget Sound Traction, Light & Power Co. v. Reynolds*, 244 U.S. 574, 37 S.Ct. 705, 61 L.Ed. 1325 (1917). The *Pudget Sound* case is also cited in appellee's brief (page 10). Thus, both the Florida Supreme Court and the appellee have overlooked the fact that, in the last-cited case, unlike here, the municipal corporation *did not have* express legislative authority to enter into the rate-setting franchise. Id., at pp. 579, 707, 1330. That this appellant/city was expressly granted such authority is apparently conceded by the Florida Supreme Court's opinion (Jurisdictional Statement, App. 5-6) and the appellee's brief (page 6).

Similarly distinguishable is the *Pawhuska* case, supra, because there the State constitution expressly prohibited

the legislature from delegating any rate-making authority. 250 U.S. at 395, 39 S.Ct. at 527, 63 L.Ed. at 1056.

This Court has often invoked the contract clause for the benefit of a public utility company whose enfranchised rates or fares were later changed by state action.[1] See, e.g., *Detroit United Railway v. Michigan*, 242 U.S. 238, 37 S.Ct. 87, 61 L.Ed. 268 (1916); *Georgia Ry. & Power Co. v. Decatur*, 262 U.S. 432, 43 S.Ct. 612, 67 L.Ed. 1065 (1923); *Los Angeles v. Los Angeles City Water Co.*, 177 U.S. 558, 575, 20 S.Ct. 736, 742, 44 L.Ed. 286, 894 (1900). Admittedly, appellant's counsel have been unable to find a case where this Court has invoked that salutary principle on behalf of the other parties to the franchise agreement, i.e., the city and its citizens/consumers. Nevertheless, it is self-evident that the public utility's vested right to a rate set by agreement should be no greater than the consuming public's.

Respectfully submitted,

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[1] In the opinion sought to be reviewed the Florida Supreme Court conceded that the franchise agreement was impaired by the challenged Statute. By an opinion filed just last month that Court has now decided that the franchise agreement was not only impaired, but that it ceased to exist. *State of Florida ex rel. Utilities Operating Co., Inc. v. Mason*, Fla.1964. ——So.2d.——.